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In the Supreme Court of the United States

JOAN WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE, PETITIONER

v.

PRAIRIE BAND POTAWATOMI NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KELLY A. JOHNSON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
M. ALICE THURSTON
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a state motor fuels tax that is "imposed on the use, sale, or delivery" of motor fuel, Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003), may be imposed on motor fuel that a non-Indian, off-reservation distributor delivers and sells directly to an Indian Tribe at its on-reservation service station.

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INTEREST OF THE UNITED STATES

Petitioner seeks to collect a tax on motor fuel that a non-Indian, off-reservation distributor delivers to an Indian Tribe at the Tribe's on-reservation service station. The United States has a substantial interest in this case by virtue of the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, and the government's trust relationship with Indian Tribes.

STATEMENT

1. Respondent Prairie Band Potawatomi Nation (the Tribe) is a federally recognized Tribe with a 121-square mile reservation in Jackson County, Kansas. J.A. 133. The Tribe's

Reservation is located in a rural area some 25 miles north of Topeka, Kansas. The Tribe's chief source of income is a tribally owned and operated on-reservation casino that generates substantial non-Indian traffic onto the Reservation. *Ibid.* The Tribe also owns and operates a retail gas station and convenience store adjacent to the casino that is known as the Nation Station. *Ibid.* The Tribe purchases gasoline and diesel fuel from an off-reservation, non-Indian distributor, Davies Oil Company, which delivers the fuel to the Nation Station. See J.A. 133.

The Nation Station sells fuel at the prevailing retail market price. J.A. 133-134. The Tribe has historically included in its market price a tribal tax, comparable to state motor fuel taxes. The tax originally was imposed at a rate of 16 cents per gallon for gasoline and 18 cents for diesel fuel, but those rates were increased to 20 and 22 cents per gallon, respectively, beginning January 2003. J.A. 48-50, 134. That tax has generated about $300,000 in revenues to the Tribe each year. J.A. 134. The Tribe, like other sovereigns, has employed those revenues for building and maintaining roads, including maintenance on the approximately one-and-one-half mile tribal road that connects the casino to United States Highway 75. *Ibid.*

2. The State of Kansas, like the federal government (see 26 U.S.C. 4081(a)(2)), other States, and many Indian Tribes, imposes a per-gallon tax on motor vehicle fuel. See Kansas Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997 & Supp. 2003). That tax is "imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in [the] state for any purpose whatsoever." *Id.* § 79-3408(a) (1997 & Supp. 2003). Beginning July 1, 2003, the state tax is imposed at a rate of 24 cents per gallon for

gasoline and 26 cents per gallon for special fuels, including diesel. *Id.* § 79-34,141 (1997 & Supp. 2003).[1]

In 1992, Kansas and the Tribe entered into an inter-governmental agreement respecting excise taxes, including taxes on motor fuel. See J.A. 20-26. That agreement, which had a five-year, renewable term, sought "to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction." J.A. 21. At that time, Kansas did not tax motor fuels delivered within Indian reservations. See *Kaul* v. *Kansas Dep't of Revenue*, 970 P.2d 60, 63 (Kan. 1998), cert. denied, 528 U.S. 812 (1999); see J.A. 18-19. Under the tribal-state agreement, the State "relinquishe[d] whatever jurisdiction it may have had to impose" a motor fuel tax for "any transaction with a non-Indian purchaser which occurs on the Reservation," subject to the conditions that the merchant be authorized under tribal law to do business on the Reservation and the merchant pay a tax to the Tribe that is not less than 60% of the prevailing state tax. J.A. 23-24.

In 1995, the Kansas legislature amended its motor fuel tax provisions. See *Kaul*, 970 P.2d at 64, 65-66. The 1995 Act, *inter alia*, amended the exception for the sale or delivery of fuel to the United States and its tax-exempt agencies to provide that "this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail

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[1] The Kansas statute provides, however, that "[n]o tax is hereby imposed upon or with respect to" certain transactions, including "[t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country," or "to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation." Kan. Stat. Ann. § 79-3408(d)(1) and (2) (1997 & Supp. 2003). The Kansas statute provides no comparable express exemption for motor fuel sold or delivered to an Indian Tribe.

dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a non-member of such reservation." See Kan. Stat. Ann. § 79-3408g(d)(2) (1997) (repealed July 1, 1998); *Kaul*, 970 P.2d at 65.

In 1997, the State declined to renew the 1992 tribal-state agreement, thereby eliminating the contractual impediment that the agreement placed to imposing a motor fuel tax on sales to retailers operating on the reservation. And in 1998, after this Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995), the Kansas legislature further amended its motor fuel tax provisions to state that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). See Kan. Sess. Laws ch. 96, § 2 (July 1, 1998).

3. The Tribe brought this suit to obtain declaratory and injunctive relief preventing Kansas from imposing its fuel tax on gasoline and diesel fuel delivered to the Tribe itself. See J.A. 10-13 (amended complaint). Specifically, the Tribe sought an order enjoining petitioner "from enforcing its state motor fuel taxes, including those under K.S.A. 79-3408, and from collecting such taxes from the Nation or its distributors with respect to motor fuel transactions or events involving motor fuel obtained by the Nation and sold by it at retail on its reservation." J.A. 13.

a. Petitioner moved for summary judgment, arguing among other things that neither federal law nor the Tribe's right of self-government preempts the state tax. See J.A. 94, 111-120. The district court identified this Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, *supra*, as providing the guiding principle. The district court stated

that, if "the legal incidence of the tax rests on non-Indians," then "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy." J.A. 112 (quoting *Chickasaw Nation*, 515 U.S. at 458). The district court recognized that the Tenth Circuit had previously ruled, in a decision construing the same Kansas Motor Fuel Tax Act, that "the legal incidence of the Kansas motor fuel tax falls upon the distributors," *Sac and Fox Nation* v. *Pierce*, 213 F.3d 566, 580 (2000), cert. denied, 531 U.S. 1144 (2001). See J.A. 117. The court granted petitioner's request for summary judgment, reasoning that the balance of interests weighed in favor of allowing the tax. J.A. 114; see J.A. 119-120.

b. The court of appeals reversed. J.A. 131-144. The court of appeals followed its prior ruling in *Sac and Fox Nation* that "[t]he Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors." J.A. 135. It therefore concluded, in accordance with this Court's decision in *Chickasaw Nation*, that the State's power to impose the tax depends on "the balance of federal, state, and tribal interests." J.A. 136 (quoting 515 U.S. at 459). The court of appeals concluded that "the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax." J.A. 137.

The court of appeals reasoned that, in this case, the Tribe's "fuel revenues are derived from value generated primarily on its reservation," J.A. 137, "because its fuel marketing is integral and essential to the gaming opportunity the Nation provides." J.A. 138. The court of appeals also concluded that the Tribe's "interests here are strengthened be-

cause of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance," J.A. 141, and "are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments." J.A. 142. By contrast, the court reasoned, the State had only a generalized interest in raising revenue, which was insufficient to uphold application of the tax. J.A. 143-144.

SUMMARY OF ARGUMENT

This Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450 (1995), makes clear that a State cannot impose the "legal incidence" of an excise tax, such as a motor fuel sales tax, on an Indian Tribe. In this case, the Kansas Supreme Court has determined in *Kaul* v. *Kansas Department of Revenue*, 970 P.2d 60 (1998), cert. denied, 528 U.S. 812 (1999), that Kansas does in fact tax retailers like respondent. The state supreme court's determination rests on a reasonable construction of the state statute and should be treated as conclusive on that matter. The Court should therefore affirm the court of appeals' judgment on that alternative (and logically antecedent) basis.

If the Court nevertheless concludes that the legal incidence of the tax is on the non-Indian distributor, that is not the end of the inquiry. The delivery and sale of goods, including gasoline, to an Indian Tribe on its reservation is subject to the Indian Trader Statutes, 25 U.S.C. 261 *et seq.* This Court held in *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980), that the State of Arizona could not impose its gross receipts tax on a non-Indian seller based on the sales price of tractors sold and delivered to an Indian Tribe on its reservation, even where the seller had no established place of business on the reservation. Under *Central Machinery*, the Kansas motor fuel tax is likewise preempted insofar as it is imposed on the sale and delivery of motor fuel to the Tribe, which imposes its own tax on sales of gasoline at the service station and sells the gasoline at prevailing prices.

Finally, even if the Indian Trader Statutes of their own force do not preempt the state tax here, then, as this Court reaffirmed in *Chickasaw Nation*, 515 U.S. at 458-459, the courts should conduct a balancing of the relevant tribal, federal, and state interests. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-145 (1980). The Court should reject the State's extraordinary suggestion that the Court abandon its firmly established balancing test, which properly takes into account the interests of all the affected sovereigns.

ARGUMENT

THE KANSAS MOTOR FUELS TAX IS PREEMPTED AS APPLIED TO SALES TO THE PRAIRIE BAND POTAWATOMI NATION WITHIN ITS RESERVATION

The Court's decision in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450 (1995), "adhere[d] to settled law" and reaffirmed the fundamental and longstanding principle that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Id.* at 453, 455 (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). See *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). The Court therefore stated, as a controlling principle, that "when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian Country." *Chickasaw Na-*

tion, 515 U.S. at 453. But even when the state tax is not imposed directly on Indians, it may be preempted if it impermissibly intrudes upon the protected interests of the Tribe or individual Indians or is inconsistent with particular measures adopted for their benefit by the federal government, which is vested by the Constitution with "exclusive authority over relations with Indian tribes." *Blackfeet Tribe*, 471 U.S. at 764.

These principles were synthesized by the Court in *Chickasaw Nation*, 515 U.S. at 457-460, which explained:

> The initial and frequently dispositive question in Indian tax cases * * * is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. * * * But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy * * * and may place on a tribe or tribal members "minimal burdens" in collecting the toll.

Id. at 458-459 (citations omitted).[2]

[2] The Court noted that the "legal incidence" test, as opposed to a "more venturesome approach" at the threshold, maintains the historic presumption that federal law preempts state taxation of Indian Tribes, and thereby preserves Congress's lead role "in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459. In addition, the "legal incidence" test "accommodates the reality that tax administration requires predictability." *Id.* at 459-460. It also enables a State to restructure its tax system to accomplish its revenue collection goals without imposing inappropriate burdens on Indian Tribes by, for example, "declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Id.* at 460 (quoting 94-771 Pet. for. Cert. at 17).

The *Chickasaw Nation* case, like this case, involved a State's attempt to impose a fuel excise tax on motor fuel that the Tribe sold at retail stores on tribal trust land. See 515 U.S. at 452-453. The Court concluded, based on a "fair interpretation of the taxing statute as written and applied," that the legal incidence of the State's fuel tax in that case rested on the Tribe. *Chickasaw Nation*, 515 U.S. at 461-462 (quoting *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)). Federal law accordingly preempted the state tax. *Ibid.*

Under *Chickasaw Nation*, then, the first inquiry in this case is whether the legal incidence of the tax "rests on the Tribe (as retailer) or on some other transactors—here, the wholesalers who sell to the Tribe or the consumers who buy from the Tribe." 515 U.S. at 459. As we explain below, in light of the Kansas Supreme Court's decision in *Kaul* v. *Kansas Department of Revenue*, 970 P.2d 60 (1998), cert. denied, 528 U.S. 812 (1999), it appears that the legal incidence of the Kansas tax is on the Tribe. But even if the Court concludes that the incidence of the tax is on the non-Indian distributor, the tax is preempted under the principles reaffirmed in *Chickasaw Nation*.

A. Under The Kansas Supreme Court's Decision In *Kaul*, The Tax Is Preempted Because Its Incidence Is On The Tribe

This Court's decisions provide concrete guidance on how to determine where the "legal incidence" of the tax lies. The Court has made clear that "the question is one of 'fair interpretation of the taxing statute.'" *Chickasaw Nation*, 515 U.S. at 461 (quoting *California Bd. of Equalization*, 474 U.S. at

11). A court may take into account the existence—or not—of any express "collection requirements" or "pass-through provisions." *Chemehuevi Tribe*, 474 U.S. at 11. In the end, however, the determination depends on the overall character of the tax. *Ibid.*[3]

"'[T]he duty rests on this Court to decide for itself'" where the legal incidence of the tax lies. *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 n.7 (1975) (quoting *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 121 (1954)). But federal courts, of course, should not evaluate state taxing statutes in a vacuum, and should consult the constructions provided by state supreme courts. See *Mississippi Tax Comm'n*, 421 U.S. at 609 n.7. "When a state court has made its own definitive determination as to the operating incidence, [the Court's] task is simplified. [The Court] give[s] this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Gurley* v. *Rhoden*, 421 U.S. 200, 208 (1975) (quoting *American Oil Co.* v. *Neill*, 380 U.S. 451, 455-456 (1965)).

In this case, the Tenth Circuit too readily assumed—based on the holding in its earlier decision in *Sac and Fox*, 213 F.3d at 580—that the legal incidence of the Kansas motor fuel tax is on the distributor. See J.A. 117, 135. The Tenth Circuit in *Sac and Fox* failed to give the weight this Court's decisions required it to give to the Kansas Supreme Court's decision in

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[3] See, *e.g.*, *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114, 126-128 (1993) (Oklahoma cannot avoid this Court's decisions "by avoiding the name 'personal property tax' here any more than Washington could in *Colville*"); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 164 (1980) (Washington cannot avoid this Court's tax immunity decisions through "mere nomenclature").

Kaul. The Kansas Supreme Court's decision in *Kaul*, although not without some ambiguity, is best read as holding that the incidence of the very tax at issue here is on the retailer. As explained below, that decision is "consistent with the statute's reasonable interpretation"—even if it is not the one this Court might adopt in the first instance—and it therefore should be "deemed conclusive." *Gurley*, 421 U.S. at 208.[4]

1. The Court's task here, as in *Chickasaw Nation*, is to determine where the legal incidence of the tax resides. See 515 U.S. at 461-462. The Kansas statute states, as a result of the 1998 post-*Chickasaw Nation* amendment, that "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) But that legislative statement is not dispositive in light of the Kansas Supreme Court's construction of the statute in *Kaul*. The Kansas Supreme Court determined that, notwithstanding that statement, the statute, read as a whole, manifested a legislative intent that "[r]etailers are taxed." 970 P.2d at 67.

The plaintiffs in *Kaul*—Indian retailers on the Prairie Band Potawatomi Nation Reservation who were not members of the Tribe—sought relief from imposition of the Kansas motor fuels tax on sales made to them by an off-reservation distributor. The Kansas Supreme Court recognized that the 1998 amendment to Kan. Stat. Ann. § 79-3408(c) newly provided that "the incidence of the tax falls on the distributor." 970 P.2d at 67. But the court read that provision in conjunc-

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[4] To the extent the Court ultimately determines that the Kansas Supreme Court's decision in *Kaul* is insufficiently clear on the threshold issue of the legal incidence of the tax, the Court may, of course, certify that question to the Kansas Supreme Court, or remand the case to the Tenth Circuit with instructions to do so. See Kan. Stat. Ann. § 60-3201 (1994).

tion with Kan. Stat. Ann. § 79-3409 (1997 & Supp. 2003), which enables the distributor to collect the tax from the retailer. The Kansas Supreme Court concluded:

> The statute clearly states that the distributor is liable for the payment of the tax, but the distributor may collect the tax from the retailer as part of the selling price of the motor fuel.

970 P.2d at 67. The Kansas Supreme Court concluded that the legislature intended distributors to collect the tax from retailers and that, "[t]herefore, Retailers are taxed." *Ibid.* Although the court reached that conclusion in evaluating the retailers' standing, it indicated that that conclusion has a broader significance in the operation of the state statute. The court concluded that the retailers were not entitled to immunity from the tax only because they were not members of the Tribe. *Id.* at 68.[5]

2. The Kansas Supreme Court's conclusion that, under the Kansas scheme, "[r]etailers are taxed" rests on a reasonable construction of the state statute, and it therefore should be treated as conclusive. *Gurley*, 421 U.S. at 208. A number of features of the Kansas statute support the Kansas court's determination that the taxing statute, fairly interpreted "as written and applied," *Chickasaw Nation*, 515 U.S. at 461, imposes the legal incidence of the tax on the retailer, notwithstanding the insertion made by the 1998 amendments stating "the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c) (Supp. 2003).[6]

[5] The Kansas Supreme Court stated: "Under the circumstances, there has been no showing by Retailers that payment of fuel tax to Kansas interferes with the self-government of a Kansas tribe or a Kansas tribal member or the tax impairs a specific right granted or reserved by federal law to the Kansas Indians. Here, the legal incidence of the tax on motor fuel rests on nontribal members [*i.e.*, the nontribal member Retailers] and does not affect the Potawatomi Indian reservation within the state of Kansas or the members of that tribe." 970 P.2d at 68.

The text and structure of the Kansas statute, both before and after its 1998 amendment, clearly manifest the intent that the tax is imposed on the use, sale, and delivery of motor fuel, Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003), that the relevant transaction is that between the distributor and the retailer, and that the distributor is entitled to collect the tax from the retailer, Kan. Stat. Ann. § 79-3409 (1997 & Supp. 2003). In these circumstances, the Kansas Supreme Court could reasonably conclude that, in the end, "[t]he distributor 'is no more than a transmittal agent for the taxes imposed on the retailer.'" *Chickasaw Nation*, 515 U.S. at 461-462.[7]

[6] See *Chickasaw Nation*, 515 U.S. at 462 ("'[T]he import of the language and structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel'; the 'motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer.' 31 F. 3d, at 971-972."); cf. *Coeur D'Alene Tribe of Idaho* v. *Hammond*, 384 F.3d 674, 685 (9th Cir. 2004), cert. denied, 125 S. Ct. 1397 (2005) (holding that a state legislature's statement that the incidence of a tax falls on a distributor is insufficient, without more, to shift the legal incidence from the Tribe).

[7] The Court has "squarely rejected the proposition that the legal incidence of a tax always falls upon the person legally liable for its payment." *Mississippi Tax Comm'n*, 421 U.S. at 607. See *id.* at 607-608 (quoting *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347-348 (1968)). Furthermore, States are not entitled to impose forbidden taxes through a drafting sleight-of-hand in which a statute purports to impose a tax on one entity, but in actual operation imposes it on another. This Court has accordingly found that it "must look through form and behind labels to substance." *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 492 (1958).

The Kansas tax is expressly "imposed on the use, sale, or delivery of all motor-vehicle fuels or special fuels which are used, sold, or delivered in this state for any purpose whatsoever." Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003). That tax, like the Oklahoma tax in *Chickasaw Nation*, is by definition an excise or sales tax that is expressly levied on the use, sale, or delivery of fuel. The provision that nominally places the incidence of the tax on the distributor cannot be given dispositive weight, even apart from the Kansas Supreme Court's decision in *Kaul*, because it is in tension with Section 79-3408(a)'s direction that the sales tax is imposed on any sale "for any purpose whatsoever." Indeed, that provision itself suggests that the actual legal incidence falls on the retailer. It goes on to provide a 2.5% exemption allowance for fuel that the distributor receives but cannot sell on account of "physical loss" while the distributor is handling the fuel. Kan. Stat. Ann. § 79-3408(c) (Supp. 2003). That exemption (which itself contains an exception for federal agencies "exempt by law from liability to state taxation" (*ibid.*)) suggests that the relevant transaction is the actual delivery and sale of the fuel to the retailer—not the fuel in the possession of the distributor before the transfer—and that the legislature intended the tax to fall on the retailer who ultimately receives the fuel.

Furthermore, the statute as a whole reveals, in other respects, that the State has targeted the sale and delivery of fuel *to retailers* for imposition of the tax. For example, the statute provides that the incidence of the tax "is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once," Kan. Stat. Ann. § 79-3408(c) (Supp. 2003), but it exempts from taxation the first sale or delivery of fuel "to a duly licensed distributor who in turn resells to another duly licensed distributor," *id.* § 79-

3408(d)(5) (1997 & Supp. 2003). That provision makes clear that it is the distributor-retailer transactions, not the first delivery of the fuel to a distributor, nor distributor-distributor transactions, that trigger the tax. See *Chickasaw Nation*, 515 U.S. at 461 (noting that an exemption for "sales between distributors" supported the inference that "the tax obligation is legally the retailer's").

Even more strikingly, the Kansas statute exempts from the tax the "*sale or delivery*" of fuel in circumstances—such as the sale to the United States or its agencies "now or hereafter exempt by law from liability to state taxation"—where the Constitution or federal law would forbid the State from imposing a sales tax *on the purchaser*. Kan. Stat. Ann. § 79-3408(d)(2) (1997 & Supp. 2003). That exemption is highly instructive in evaluating the operating incidence of the Kansas tax for present purposes. If the tax does not fall on the purchaser/retailer, it would be strange to provide an exemption based on the purchaser's status.

The Kansas statute also provides that, if the State enacts a tax increase, the retailer is liable for a tax or refund in the amount of the increase with respect to any fuel in its existing inventory. Kan. Stat. Ann. § 79-3408c(a) and (b) (1997 & Supp. 2003). Correspondingly, if the tax rate decreases, the retailer is entitled to a refund with respect to any fuel in its existing inventory. *Id.* § 79-3408c(b). At odds with the notion that an on-reservation tribal retailer does not generally bear the legal incidence of the tax, the Kansas statute expressly exempts from those provisions any Native American retailer whose place of business is on the retailer's reservation. *Id.* § 79-3408c(c) (1997 & Supp. 2003).

Finally, the Kansas statute exempts from the tax the sale or delivery of fuel "for export from the state of Kansas to any

other state or territory or to any foreign country." Kan. Stat. Ann. § 79-3408(d)(1) (1997 & Supp. 2003). The apparent rationale for that exemption is that the sellers of motor fuel in another State or territory or in a foreign country are taxed by their respective government to maintain the roads within that jurisdiction. See *Kaul*, 970 P.2d at 66. Here, where the Tribe imposes a fuel tax on the sales of motor fuel within its jurisdiction, the same rationale reinforces the basis for finding the Kansas fuel tax inapplicable to sales or deliveries made to the Tribe on its Reservation.[8]

Given these structural characteristics of the Kansas motor fuel tax statute, the Kansas Supreme Court was certainly reasonable in concluding, under a "fair interpretation of the taxing statute as written and applied," *Chickasaw Nation*, 515 U.S. at 461-462, that Kansas has placed the legal incidence of the tax on the retailer.

3. In determining legal incidence, the court of appeals in this case followed its earlier decision in *Sac and Fox Nation*, which held that the Kansas taxing statute at issue here places the legal incidence of the tax on the distributor. See J.A. 117, 135. The court of appeals' analysis in *Sac and Fox Nation*, however, was flawed because it failed to give sufficient weight to the Kansas Supreme Court's interpretation of state law.

The Tenth Circuit correctly recognized that "the legal incidence of a tax does not always fall upon the entity legally

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[8] Under this Court's decisions beginning with *Montana* v. *United States*, 450 U.S. 544 (1981), a Tribe does not have plenary jurisdiction to tax within the borders of its reservation. A Tribe may not, for example, tax the activities of nonmembers on non-Indian fee land. See, *e.g.*, *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001). There is little doubt, however, that the Tribe here may tax retail sales of gasoline made at its own service station on the Reservation.

liable for payment of the tax" and that "the question is one of 'fair interpretation of the taxing statute as written and applied.'" 213 F.3d at 578. It also understood the Kansas Supreme Court in *Kaul* as "suggesting that the legal incidence of the Kansas motor fuel tax fell on the retailers where the distributors itemized the tax on retailers' bills as money due the State." *Id.* at 578-579. But the court refused to give any consideration, beyond a "but see" citation, to the state supreme court's interpretation of state law. *Ibid.*

Instead, the Tenth Circuit concluded that the legal incidence of the tax did not fall on the retailers because the Kansas law's pass-through provision is "permissive rather than mandatory," 213 F.3d at 579, noting that, "if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes, *id.* at 580. The court's conclusion is mistaken in at least three basic respects.

First, as explained above, the Kansas Supreme Court's determination respecting the operating incidence of the motor fuel tax under the Kansas statute is, at the very least, "consistent with the statute's reasonable interpretation," and should therefore be "deemed conclusive." *Gurley* v. *Rhoden*, 421 U.S. at 208. Yet the Tenth Circuit erred in failing even to inquire whether the Kansas Supreme Court's understanding of the state statute was reasonable.

Second, this Court's decisions do not hold that a State *must* require the distributor to pass through the tax in order to place the legal incidence on the retailer. Rather, *Mississippi Tax Commission* provides that a mandatory pass-through "establishes as a matter of law" that the legal incidence rests with the retailer. 421 U.S. at 608. As *Chickasaw*

Nation itself indicates, a court may still determine—based on a "fair interpretation of the taxing statute as written and applied" and without regard to that per se rule—that the legal incidence rests on the retailer. 515 U.S. at 461. See *Chemehuevi Tribe*, 474 U.S. at 11 (noting that the Court's cases do not suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the person liable for remitting the tax is required to pass on the tax to the purchaser).

Third, the court of appeals was in any event wrong in attaching the significance it did to its own perception that the Kansas statute does not "require[] distributors to include the amount of the fuel tax in their wholesale price." 213 F.3d at 580. The ultimate inquiry under this Court's cases is what the State intended with respect to the operative incidence of the tax. See *Mississippi Tax Comm'n*, 421 U.S. at 607-609. The Kansas Supreme Court made clear in *Kaul* that the Kansas legislature "*intended* that distributors pay the tax and include the fuel tax in the sales price when delivering fuel to retailers or collect the fuel tax from the retailers at the time the distributors deliver the motor fuel to the retailers. Therefore, Retailers are taxed * * * ." 970 P.2d at 67 (emphasis added).

In short, although the distributors are legally obligated to pay the tax, and thus serve as the State's "transmittal agent," *Chickasaw Nation*, 515 U.S. at 461-462, the Kansas Supreme Court has reasonably determined, in accordance with Kansas's overall motor fuel taxing scheme, that "[r]etailers are taxed." 970 P.2d at 67. The Tribe, as a retailer, therefore bears the "legal incidence" of the tax and, under *Chickasaw Nation*, is entitled to immunity from that tax. 515 U.S. at 459.

4. As *Chickasaw Nation* made clear, Kansas remains "free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. But it must do it in a way that alters, as a matter of substance and not merely as a matter of form or labels, what this Court has identified as the actual *legal incidence* of the tax. See *Mississippi Tax Comm'n*, 421 U.S. at 607-609.

Instead, the State must structure it levy so that the tax, as "written *and* applied," places the tax burden on the distributors. See *Chickasaw Nation*, 515 U.S. at 461 (emphasis added). The State might do so by, for example, taxing the receipt by the distributor alone rather than "the use, sale or delivery * * * for any purpose whatsoever," thereby removing any legal obligation for downstream retailers to pay the tax or to reimburse the distributor for the tax. See *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268, 272 (1975) (Stevens, J., dissenting). Or the State might chose some other equally effective means. But at present, the fair interpretation of the Kansas statute given it by the Kansas Supreme Court indicates that "[r]etailers are taxed," and that the legal incidence of the tax therefore remains on the Indian Tribe. See Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003); *Kaul*, 970 P.2d at 67. The judgment of the court of appeals should be affirmed on that logically antecedent ground.

B. Even If The Legal Incidence Of The Tax Is On The Distributor, The Tax Is Preempted By The Indian Trader Statutes Because It Is Imposed On The Sale Or Delivery Of Fuel To The Tribe On Its Reservation

If the Court concludes that the legal incidence of the Kansas motor fuel tax does in fact fall on the non-Indian distributor, that does not end the inquiry. To the contrary, even if the legal incidence for payment of the tax is on the distributor, it

remains the case that the tax is expressly imposed on the sale, use, or delivery of the fuel. See Kan. Stat. Ann. § 79-3408(a) (1997 & Supp. 2003). In this case, the non-Indian distributor sells the fuel to the Tribe and delivers the fuel to the Tribe at its on-reservation service station. That transaction between the distributor and the Tribe is thus the subject matter to which the tax is addressed. See pp. 12-16, *supra*. Imposition of the state tax on the sale in these circumstances therefore implicates the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, which Congress enacted pursuant to its express constitutional power to "regulate Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 3, Cl. 8, see *Wooster* v. *Georgia*, 31 U.S. (6 Pet.) 515 , 559, 561 (1832), and which trace back to 1790, Act of July 22, 1790, ch. 33, 1 Stat. 137. Those statutes govern trade between persons who sell goods to Indian Tribes or their members, and they have been held to preempt certain state taxes even where the legal incidence of the tax is on the trader.

1. This Court unanimously held in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), that the Indian Trader Statutes and implementing regulations prohibited the State of Arizona from imposing its gross proceeds tax on the operator of a federally licensed retail trading post located on the Navajo Reservation. The Court later ruled in *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980), that, under *Warren Trading Post*, the Indian Trader Statutes prohibited Arizona from imposing the same tax on the sale of farm machinery to an Indian Tribe when the sale took place on the reservation.

The Court in *Central Machinery* rejected the contention that *Warren Trading Post* could be distinguished on the ground that the non-Indian corporation that sold the farm

equipment did not reside on the reservation and had not been issued a license to trade with Indians. The Court held that "[t]he Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." 448 U.S. at 165. The Court found it "irrelevant that [the seller] is not a licensed Indian trader," noting that the sale of farm equipment at issue in that case "falls squarely within the language of 25 U.S.C. 264, which makes it a criminal offense for '[a]ny person to introduce goods, or to trade' without a license 'in the Indian country or on any Indian reservation.'" 448 U.S. at 164-165. It is the existence of the Indian trader statutes, then, and not their administration," the Court explained, "that preempts the field of transactions with Indians occurring on reservations." *Id.* at 160 (footnote omitted). Under the rule set out in *Central Machinery*, the state tax here is similarly preempted insofar as it is imposed on the delivery and sale of motor fuel to the Tribe on its Reservation, even though (as we have been informed by the Department of the Interior) the non-Indian distributor in this case does not have a license to trade with the Tribe.[9]

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[9] The sale in this case would presumably be governed by the Uniform Commercial Code, either as a matter of state law or tribal law. The Kansas Uniform Commercial Code defines a "sale" as "the passing of title from the seller to the buyer for a price" and provides that "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." Kan. Stat. Ann. §§ 84-2-106(1), 84-2-401(2) (1996). It appears in this case that the sale of motor fuel by the distributor to respondent Tribe occurs upon completion of the distributor's obligation to tender delivery at the Tribe's service station on the Reservation. Under such an arrangement, the sale takes place on the Reservation for purposes of the application of the Indian Trader Statutes.

2. The Tenth Circuit, in its prior decision in *Sac and Fox Nation*, appeared to recognize that application of the Kansas motor fuel tax to sales to Indian Tribes on their reservations was problematic under *Warren Trading Post* and *Central Machinery*. See 213 F.3d at 581. The Tenth Circuit incorrectly concluded, however, that *Central Machinery* had been undermined by this Court's decision in *Department of Taxation and Finance* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994), which, the Tenth Circuit said, had "narrowed" the interpretation of the Indian Trader Statutes. 213 F.3d at 582-583.

In *Milhelm Attea*, the State of New York imposed what the Court accepted as a *valid* tax on non-Indian consumers who purchased cigarettes at tribally operated stores on Indian reservations in that State. The question was not the validity of the tax *vel non*, but whether the Indian Trader Statutes barred New York from imposing certain record-keeping and other requirements on non-Indian wholesalers, who were licensed Indian traders and who sold cigarettes to the on-reservation tribal retailers, in order to prevent circumvention of the "concededly lawful" tax imposed on the ultimate consumer. 512 U.S. at 75 (quoting *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 61, 482-483 (1976)). The Court held that the Indian Trader Statutes did not require the facial invalidation of the state statutory provisions that imposed those regulatory burdens on the non-Indian traders. See 512 U.S. at 73-78. In the course of its analysis, the Court recited the holdings in *Warren Trading Post* and *Central Machinery*, without suggesting that either decision had lost its precedential force. See *id.* at 70-71, 74-75.

This case, in contrast to *Milhelm Attea*, involves the antecedent question whether the state tax, if imposed on the distributor with respect to its on-reservation sales to an Indian Tribe, is lawful, or is instead preempted by the Indian Trader Statutes. That question is analytically distinct from the question whether the Indian Trader Statutes bar the imposition of certain ancillary regulatory burdens on an Indian trader in connection with the collection of a concededly lawful tax imposed on non-Indian customers of an Indian trader.

Indeed, the Court itself drew that very distinction in *Milhelm Attea*. The Court explained that "[t]he specific kind of state tax obligation that New York's regulations are designed to enforce—which falls on non-Indian purchasers of goods that are merely retailed on a reservation—stands on a markedly different footing from *a tax imposed directly on Indian traders*, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.'" 512 U.S. at 73 (quoting *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156-157 (1980))(emphasis added). Elsewhere in its opinion, the Court reiterated that "[t]he state law [it] found pre-empted in *Warren Trading Post* was a tax directly 'imposed upon Indian traders for trading with Indians.'" 512 U.S. at 74 (quoting 380 U.S. at 691). It cited *Central Machinery* for the same proposition. 512 U.S. at 74 (citing 448 U.S. at 164). "That characterization," the Court continued, "does not apply to regulations designed to prevent circumvention of 'concededly lawful' taxes owed by non-Indians." *Id.* at 74-75.

If the Court concludes that the legal incidence of the Kansas motor fuel tax is on the distributor, then this case, like *Warren Trading Post* and *Central Machinery*, involves "a tax directly imposed upon Indian traders for trading with Indians." *Milhelm Attea*, 512 U.S. at 74 (internal quotation marks omitted). To be sure, in this case, unlike *Warren Trading*

Post and *Central Machinery*, the sales are made to the Tribe for subsequent sale of the gasoline at retail to customers who include a significant percentage of non-Indians at the Tribe's service station. But the Court in *Milhelm Attea* did not question the proposition that the Indian Trader Statutes apply to non-Indian wholesalers who trade with Indians or Indian Tribes.[10]

This case would stand on a different footing if the Indian retailer—whether a Tribe or a tribal member—that purchased motor fuel from a non-Indian distributor merely sought to take advantage of an immunity from state taxation by selling the gasoline at retail at a greatly reduced price that effectively marketed that immunity. In that situation, the retailer, even if the Tribe itself, would not be advancing any sovereign interest of the Tribe, but would merely be enabling its customers to avoid the payment of the taxes of another sovereign. There is no reason to extend the preemptive effect of the Indian Trader Statutes to that situation, where the Tribe or tribal member is merely "market[ing] an exemption from state taxation." *Confederated Tribes of Colville Reservation*, 447 U.S. at 155; see *id.* at 155-157.

In this case, however, the Tribe, in its sovereign capacity, imposes its own motor fuel tax on sales at the service station.

[10] Indeed, the Court specifically pointed out that the Interior Department had issued Indian trader licenses to 64 wholesalers in the State of New York. See 512 U.S. at 74 n.10. The Indian Trader Statutes are designed to protect the Indians and Indian Tribes, and *Warren Trading Post* and *Central Machinery* make clear that state taxes imposed on non-Indians for their trade with Indians are preempted by those Statutes where they would unduly interfere with distinct and substantial interests of the Indians. As explained in the text, imposition of the state taxes at issue here have that effect and therefore are preempted.

The fuel is sold at fair market price, the rate of the Tribe's tax is roughly comparable to the tax imposed by the State, and the proceeds of the tax are dedicated to the building and maintenance of roads on the Reservation in the same manner as Kansas and other States, as well as the federal government, collect and spend fuel taxes for such purposes. See J.A. 133-134, 141-143. If the State were permitted to impose its motor fuel tax on sales to the Tribe, the Tribe would be effectively deprived of the tax base that other sovereigns use to fund important government activities. See J.A. 142. In these circumstances, where the Tribe is not merely marketing an exemption from state taxation, but has asserted a distinct and substantial sovereign interest in the matter, the Indian Trader Statutes, as construed in *Warren Trading Post* and *Central Machinery*, preempt the state tax. Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 186 (1989) (noting that the state severance tax in that case did not "impose a substantial burden on the Tribe").

This Court held in *Colville* that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U.S. at 152. The Court reiterated that holding in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), explaining that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management," and "enables a tribal government to raise money for essential services." The essential services here concern the building and maintenance of roads, which are open to Indians and non-Indians alike.

Recent federal reports convincingly demonstrate the importance of the tribal interest at stake. Indian reservation roads are in very poor condition, which affects not only driving safety, but also the ability to furnish emergency medical, fire, and police services on an expedited basis, transportation to schools and jobs, and the advancement of economic activity that is critical to tribal self-sufficiency.[11] To address those problems, the Department of the Interior recently promulgated extensive regulations to implement the Indian Reservation Roads Program. See 69 Fed. Reg. 43,090 (2004); 25 C.F.R. Pt. 170. Those regulations are devoted to enhancing the ability of tribal governments to address the condition of roads on their reservations, the expenditure of federal funds dedicated to that purpose, and the ability of Tribes to assume responsibility for the expenditure of those funds under self-determination contracts. The regulations also contemplate that Tribes may supplement funds received from the federal government with their own revenues, specifically including a "tribal fuel tax." 25 C.F.R. 170.932(d). The federal government and the Tribe share an important and convincingly articulated interest in raising revenues to support reservation roads. Indeed, the State of Kansas is a beneficiary of that interest because the roads that the Tribe builds and maintains through the use of its tax revenues are within the State as

[11] The number of fatal motor vehicle crashes on Indian reservations has *increased* 52.5% (one third involving non-Indians) during a period in which the nationwide number has decreased 2.2%. See U.S. Dep't of Transp., *Fatal Motor Vehicle Crashes on Indian Reservations 1975-2002*, Rep. No. DOT HS 809-727, at 3, 21 (April 2004). See generally Bureau of Indian Affairs, *Transportation Serving Native American Lands* (May 2003); see also S. Rep. No. 406, 106th Cong., 2d Sess. 1-6, 9, 11 (2000).

well as the Reservation, and they are open to the non-Indian as well as the Indian citizens of the State.

C. The Court Should Continue To Employ The Balancing Of Interests Test In Evaluating State Taxes That Burden Indian Tribes But Whose Legal Incidence Does Not Rest On The Tribes

This Court reaffirmed in *Chickasaw Nation* that, if the legal incidence of a tax implicating Indian interests rests on a non-Indian, then a court must weigh the respective federal, state, and tribal interests to determine whether the State may impose the levy. See 516 U.S. at 459. For the reasons already explained, there is no need to apply that test in this case. If the Court did undertake a balancing test, all the foregoing considerations would weigh in the Tribe's favor. But more fundamentally, this Court certainly should not embrace petitioner's suggestion (Br. 21-33) that the Court *jettison* the balancing-of-interests test, which provides a sensible and settled approach to determining Indian tax immunity. See *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-145 (1980); *Colville*, 447 U.S. at 154-157.

Petitioner makes much of the notion that its proposed bright-line rule—which would categorically allow any ostensible "off-reservation" tax on non-Indians regardless of its impact on Indian Tribes so long as Congress has not expressly preempted it—has the virtue of simplicity. But the Court considered and rejected that approach in developing the balancing-of-interests test. See *Colville*, 447 U.S. at 176-186 (Rehnquist, J., concurring and dissenting). And since that time, the Court has decidedly found undesirable similar bright-line rules in cases in which state taxes may potentially impinge on tribal interests. See, *e.g.*, *Cotton Petroleum Corp.*,

490 U.S. at 176 (Instead of a "mechanical or absolute test," the Court has "applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'") (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982)). This Court's balancing-of-interests test rightly recognizes that it is essential to consider, even when the legal incidence of a state tax rests on non-Indians, whether the tax nevertheless places an undue burden on the Tribe.

Petitioner's rule would also broadly disrupt, at a practical level, the complex relationships that have developed between the federal government, the States, and the Indian Tribes on a wide variety of issues. Following this Court's advice, States and Indian Tribes have entered into intergovernmental tax agreements addressing areas of mutual concern. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991)("States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 48 Stat. 987, as amended, 25 U.S.C. § 476."); see also Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes*, 78 Or. L. Rev. 501, 546 (1999) (noting that "[m]ore than 200 Tribes in eighteen states have resolved their taxation disputes by entering into intergovernmental agreements"). Many of those recent, post-*Chickasaw Nation* agreements specifically address the issue of fuel taxes and provide for an equitable allocation of reservation-generated revenues.[12]

[12] See *e.g.*, Fort Peck - Montana Gasoline Tax Agreement (Mar. 24, 1992); Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002); Motor Fuels Contract Between the State of Oklahoma and the Seneca-Cayuga Tribe of Oklahoma (Feb. 10, 2004); Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the Nisqually Indian Tribe and the State of Washington (Sept. 18, 2001); Amended Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (Mar. 9, 2004); Agreement for the Collection and Dissemination of Motor Fuels Taxes Between the State of Nebraska and the Winnebago Tribe of Nebraska (Jan. 24, 2002).

If the Court were to discard what it recently described as "settled law," *Chickasaw Nation*, 515 U.S. at 453, the foundation for those constructive intergovernmental agreements would be undermined. State and tribal governments have undertaken serious cooperative efforts to address a matter of vital interest to the federal, state and Indian governments —the generation of revenue, through the traditional method of motor fuel taxes, for construction and maintenance of Indian reservation roads. See J.A. 141-142; see note 12, *supra*. If the Court were to jettison its established methodology for evaluating the propriety of state taxes, the consequences for intergovernmental cooperation in the case of fuel taxes—as well as many other areas—could be far-reaching.

Ultimately, there is neither need nor warrant for the Court to disrupt those cooperative efforts. The state tax at issue here cannot be imposed on the Tribe for the same reason that the state tax in *Chickasaw Nation* was impermissible—the State has improperly placed the legal incidence of the motor fuel tax on the Tribe. In any event, the state tax at issue here would be preempted by the Indian Trader Statutes. The Court should affirm the court of appeals' judgment on that basis and leave it to the State to properly alter the legal incidence of its tax, if it so desires, in accordance with this

Court's decisions. Alternatively, of course, the State and the Tribe remain free to resolve this and other tax issues by mutual agreement, as they did in a formal agreement that was in effect between 1992 and 1997.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
KELLY A. JOHNSON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
M. ALICE THURSTON
DAVID C. SHILTON
Attorneys

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